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In the

Supreme Court of the United States

OCTOBER TERM, 1959

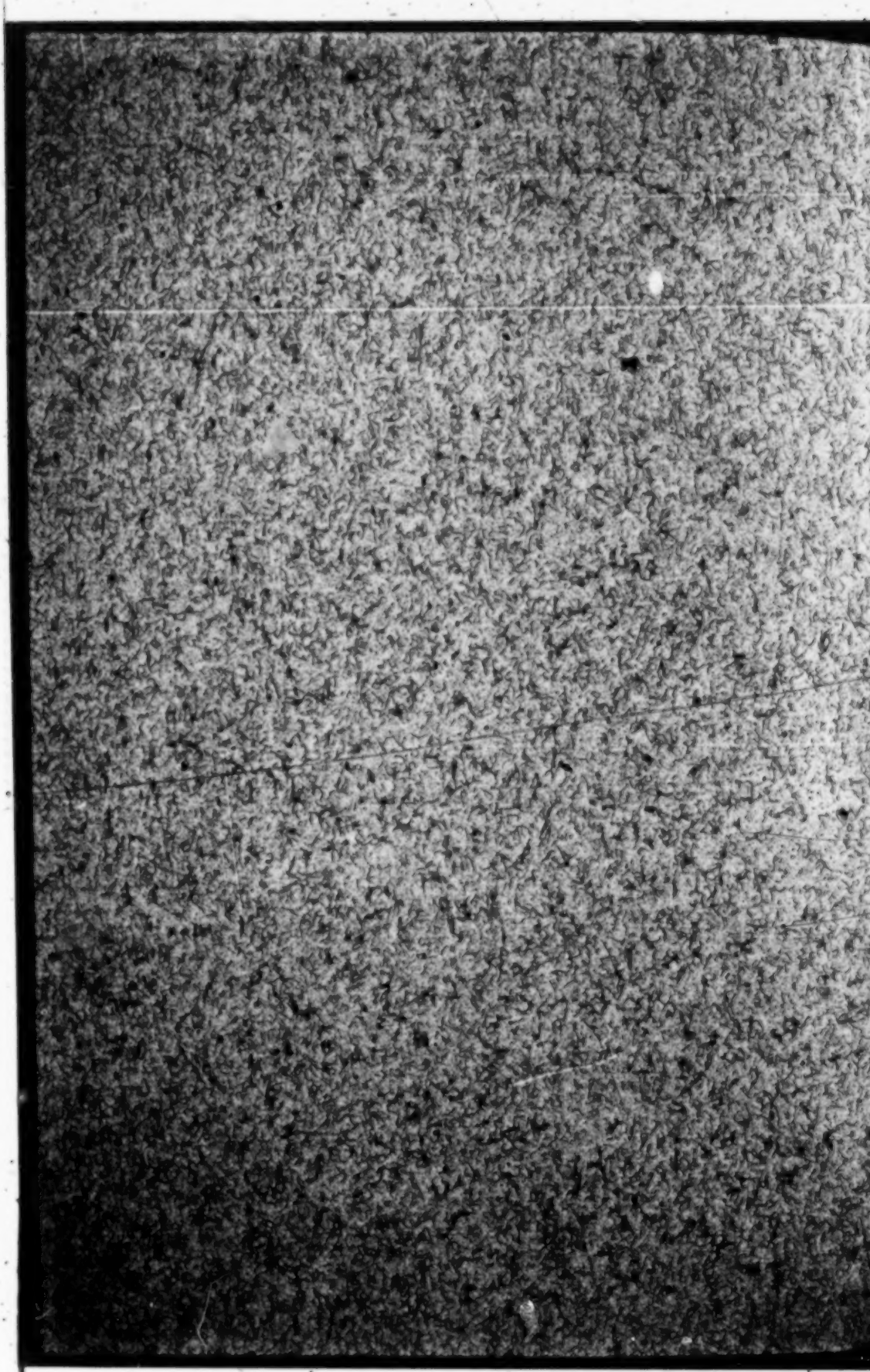
THE UNITED STATES OF AMERICA, PLAINTIFF,

v.

THE STATE OF OREGON, DEFENDANT.

Motion for Leave to File Bill of Complaint and Bill of Complaint

Motion and Complaint of the State of Oregon



IN THE SUPREME COURT OF THE UNITED STATES

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
THE STATE OF OREGON,
Defendant.

MOTION

Comes now the state of Oregon and moves the court for an order permitting it to file an Amended Answer to the Bill of Complaint of the United States of America filed herein, and Counterclaim. This motion is for the purpose of more clearly pleading the facts upon which the State of Oregon relies for its defense herein and the basis of its counterclaim under which it asserts title to Malheur lake, Mud lake, the Narrows and Harney lake and the waters and beds thereof, the subject-matter of the above entitled suit.

I. H. VAN WINKLE,
Attorney General of Oregon,

L. A. LILJEQVIST,
Assistant Attorney General.

The United States of America in the above-entitled cause has no objection to the filing of the Amended Answer and Counterclaim.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

Original No. 22

THE UNITED STATES OF AMERICA, PLAINTIFF,

v.

THE STATE OF OREGON, DEFENDANT.

Amended Answer and Counterclaim of the State of Oregon

For its amended answer to the Bill of Complaint of the plaintiff in the above entitled suit, with leave of court first had and obtained, the State of Oregon, defendant above named, says:

I.

Answering paragraph I of the Bill of Complaint defendant denies that long prior to the admission of Oregon into the Union on February 14, 1859, or at any time prior thereto, the United States became, or at any time since has been, seized in fee or otherwise of a large tract of lake bed land, or any tract of lake bed land, known as Malheur or Harney lakes, or including a small strip of land or any strip of land constituting and connecting the channel between said lakes, and known as Mud lake

and the Narrows. Defendant denies that any portion of the areas or tracts referred to and designated either as Malheur lake or Harney lake or Mud lake or the Narrows was at any time prior to the admission of Oregon into the Union, or at any time since, or that the same now is, or constitutes what is known as lake bed land, but in this respect alleges that at all times prior to the admission of Oregon into the Union and since, and now, that what is designated in paragraph I and elsewhere in plaintiff's Bill of Complaint as lake bed land or lands was at all such times, and now is, and constitutes the bed of lakes, and the greater portion thereof was, has been and now is covered by the waters of such respective lakes and alleges that only a portion thereof along the outer margins of such lakes, and each of them, are bare at ordinary stages of law water, but alleges that the entire bed of said lakes has at all times been and is covered by the waters at the time of ordinary high-water at ordinary recurring seasons, and defendant alleges that the waters of such lakes have not permanently receded below the meander line or the ordinary high-water mark, and that no portion of said beds below the meander line constitute relicted lands and in this respect this defendant alleges that wherever in this Answer lake bed land or lands are referred to that it is the intention of this

Answer that the same should be deemed to refer to the bed of said lakes underneath the waters thereof up to ordinary high-water line.

Defendant denies each and every other allegation contained in paragraph I of plaintiff's Bill of Complaint.

II.

Defendant admits that long prior to 1859 the lands adjacent to and surrounding the lake bed lands, above described, were part of the public domain of the United States, and defendant alleges that said lake bed lands, prior to the admission of Oregon into the Union, were held by the plaintiff in trust for the future state.

III.

Defendant admits that the lake bed lands above described, for the most part, have not been surveyed, and in this respect, defendant alleges that Malheur lake, including Mud lake and the Narrows, was meandered for the second time by a public survey made in 1895, and certain lands, between said public survey of 1895 and prior public surveys made in 1877 and other prior years, were surveyed by the United States government, and plats thereof duly approved by the Commissioner of the General Land Office were made and filed with the Department of the Interior, and now con-

stitute a part of the public land surveys of the United States. The defendant denies that the shores or banks of Malheur or Harney lakes, or of Mud lake and the Narrows, always have been, or at any time have been, or now are, undefined or untraceable upon the ground, and denies that the correct acreage or boundaries thereof cannot be set forth.

Defendant admits that a map, marked Exhibit "A", showing the general location of the lake bed lands involved in this suit, and in plaintiff's Bill of Complaint described as Malheur, Harney and Mud lake respectively, including the Narrows, is attached to plaintiff's Bill of Complaint.

Defendant denies each and every other allegation contained in paragraph III of Plaintiff's Bill of Complaint.

IV.

Defendant admits that in 1877 the Secretary of the Interior, pursuant to the laws of the United States, directed a public survey to be made of the lands owned by the United States in the vicinity of Malheur lake, and admits that in connection therewith a surveyor ran a meander line, but denies that said meander line was incomplete, and denies that said Secretary of the Interior directed that the bed of the lake below the high-water mark thereof should be surveyed.

The defendant denies that said meander line survey, made in 1877, was carried on at different contours, or at different elevations, and denies that said meander line survey, at the time same was made, was not the boundary line of Malheur lake; but this defendant admits that the contour line of said meander line survey made in 1877 is not now the boundary line of Malheur lake.

V.

Defendant admits that the Secretary of the Interior caused a further public survey to be made in 1895 of certain lands within the boundaries of said meander survey made in 1877, and of certain other land in the vicinity of Harney lake, including a small strip of land around the borders of Mud lake and the Narrows, and admits that in connection therewith the surveyor ran a meander line around Malheur lake, including Mud lake and the Narrows, but this defendant denies that said meander line was an incomplete meander line and denies that the same was incorrectly made or run.

Defendant denies that said meander line survey made in 1895 was carried on at different elevations or without contours, and denies that said meander line survey is not now or never has been the boundary of Malheur and/or Harney lakes, including the portion or channel known as Mud lake and the Narrows.

VI.

Defendant admits that on August 18, 1908, the President of the United States issued and made a proclamation, a copy of which proclamation, with diagram attached thereto, is marked Exhibit "B", and annexed to plaintiff's Bill of Complaint, but defendant denies that said proclamation or pretended executive order was of any force or effect, or that it set apart or reserved for the use of the Department of Agriculture all or any of the lands therein designated, or any portion of the lake or bed thereof within the boundaries of the meander line of Harney lake, or within the boundaries of the meander line of 1895 of Malheur lake, Mud lake or the Narrows; and denies that any portion of the lands or beds of said lakes or of the uplands surrounding the said lakes or any of them was owned by the United States on August 18, 1908, or at any other time or at all, and denies that the United States or the executive or the president thereof created a permanent preserve, or any preserve or breeding ground for native birds or any birds, in what is designated in plaintiff's Bill of Complaint as pretended Lake Malheur reservation, and the defendant denies that the plaintiff or the president of the United States had any authority or jurisdiction to issue such proclamation, or to create any bird reserve or breeding ground over any portion

of the lands or lake beds, or waters of such lake beds, referred to in said Bill of Complaint, or at all.

Defendant admits that by treaty and acts of Congress the United States, by and through its Secretary of Agriculture, has undertaken the conservation of migratory and native birds on property of the United States, and upon preserves legally established under any valid law or valid executive order; and admits that plaintiff has authorized the Secretary of Agriculture to permit or prohibit the use of lands in such valid preserve, under rules and regulations to be prescribed by said Secretary of Agriculture. The defendant denies that the Secretary of Agriculture has authority over any of the lands touching the shore line of Malheur, Harney or Mud lakes, or the Narrows, or any of the lake bed lands or waters thereof as a bird preserve, or otherwise.

Defendant admits that the Secretary of Agriculture, through the Bureau of Biological Survey, has attempted to administer such lands touching the shore lines of Malheur and Harney lakes, and said lake bed lands and the waters thereof of said pretended Lake Malheur reservation, but denies that there has been any authority therefor.

Defendant admits that said Lake Malheur is one of the most important areas in the United States for the propagation and conservation of

migratory and native birds, but denies that the same constitutes any valid or legal migratory or native bird reserve.

Defendant admits that the purported boundaries of said purported preserve have not been attempted to be changed by any subsequent pretended proclamation or act of Congress, and admits that the plaintiff contends that such alleged boundaries of such alleged reservation remain the same today as when attempted to be established by the purported public proclamation of August 18, 1908. Defendant admits that since August 18, 1908, no portion of the beds of the lakes within the purported boundaries of said so-called Lake Malheur reservation has been or is now a part of the public domain of the United States, or subject to disposal under existing acts of Congress. In this regard, defendant alleges that at no times since Oregon was admitted into the Union has any portion of the shore or lake beds of Malheur lake, including Mud lake, and the Narrows, a part thereof, or Harney lake, been a part of the public domain of the United States. Defendant admits that since said purported proclamation the plaintiff has attempted to use and occupy such pretended Lake Malheur reservation for the purposes specified in said proclamation.

Defendant denies each and every other allegation contained in paragraph VI of plaintiff's Bill of Complaint.

VII.

Defendant admits that Harney valley, Harney county, Oregon, within which the lakes described in plaintiff's Bill of Complaint are situated, embraces approximately seven hundred square miles of land, but denies that all of the same constitutes plain and lake surface land. Defendant denies that said Harney valley is the largest single expanse of practically level land in Oregon, and denies that said Harney valley is practically level. Defendant admits that said Harney valley is irregular in outline, and admits that its diameter in some directions is approximately fifty to sixty miles; admits that said valley land is traversed by roads connecting localities where water can be obtained, but alleges that said roads do not traverse lands which are only broad or level, or that such roads connect only communities where water can be obtained. Defendant admits that portions of said valley are level-floored, and such portions can be crossed by wagon in substantially all directions; admits that a portion of the surface of the soft material forming the valley floor is alluvial, and has been brought in part by small, flashy mountain streams, and deposited partly in low grade alluvium fans,

but this defendant denies that all of said surface is alluvial, or has been brought by small flashy mountain streams, or deposited in alluvium fans. Defendant admits that over the surface of the valley the winds have deposited some material in the form of sand and dust, but denies that the same has been deposited over stream shaped surface alone or that such covering is thin or inconspicuous in most localities. Defendant denies that the lakes or beds of lakes involved in this suit lie in an arid, substantially barren or desert country, or in any barren or desolate country; denies that the natural resources of this region from time immemorial have made it only a grazing country, but alleges that said region is very valuable for grazing, and admits that the population is small and somewhat scattered, but denies that it is very small or exceedingly scattered. Defendant admits that the principal settlements in Harney valley are Burns, Harney, Lawen and Narrows, and admits that ever since their establishment they have been and are now connected together with good roads, and alleges that Burns is an incorporated city and is the county seat of Harney county.

Defendant admits that the drainage basin of Harney and Malheur lakes is approximately 5,340 square miles. Defendant admits that prior to about 1877 Malheur and what is now known as

Harney lake were separated by a sand reef about four miles southwesterly of what is known as the "Narrows," and admits that subsequent to 1877 this barrier was broken through, and at divers times Malheur lake became united with the water surface of Harney lake, but this defendant denies that said reef is northwest of the Narrows, or such waters became united only with the lower water surface of Harney lake, or that it was connected by a strait, approximately fifty to seventy-five yards wide, described as Mud lake and the Narrows, but alleges that a strait was cut through said sand reef, permitting the waters of Malheur lake, Mud lake and the Narrows to flow into Harney lake through a channel approximately fifty to seventy-five yards in width.

Defendant admits that the principal source of inflow of water into Malheur lake from time immemorial has been and now is Silvies river on the north, and the Donner und Blitzen river on the south, and admits that each of said rivers has its origin in the mountain, but denies that the same are small, flashy, or typical mountain streams. Defendant alleges that the average total annual flow of waters of the Silvies river has been and is in excess of 130,000 acre-feet. Defendant alleges that the average total annual flow of waters of the Donner und Blitzen river has been and is in excess of 150,000 acre-feet.

Defendant denies that the only source of inflow into Harney lake has been from Malheur lake and Silver creek, but admits that the chief source of inflow of Harney lake at all times has been and now is from Malheur lake, through the Narrows, and from a stream called Silver creek flowing therein from the north, but defendant denies that said Silver creek is small or inconsistent, or a typical mountain stream; defendant admits that Silver creek has its source in the mountains, and alleges that the total annual average flow of waters of said Silver creek has been and is in excess of 75,000 acre-feet.

The normal average annual precipitation in Harney valley is approximately ten inches.

Defendant denies that Harney and Malheur lakes always have been, but admits that they now are, during a portion of the year, shallow lakes, the water thereof being extremely variable in area and depth at the present time; admits that for some years prior to the commencement of this suit Harney lake has been substantially dry, but defendant is without knowledge as to how many years prior to the commencement of this suit Harney lake has been substantially dry. Defendant denies that the waters of Malheur lake have receded, or that the recession of the water in said lake most of each year or any portion of any year is nearly com-

plete, or that there is or has been any permanent recession, and alleges that the cause of the uncovering of a large portion of the bed of Malheur lake at this time, and which is the identical condition alleged to be a recession of the water in said Malheur lake in plaintiff's Bill of Complaint, is due to the impounding of vast quantities of water in reservoirs on the Silvies and the Donner und Blitzen rivers, and the diversion of large quantities of the waters of said rivers for the reclamation of uplands within irrigation districts in Harney valley, and the use of water for the irrigation of large tracts of uplands by large numbers of private individuals and corporations, and defendant alleges that if the waters of said Silvies and the Donner und Blitzen rivers were or are not diverted for irrigation purposes, but were or are allowed to flow into said Malheur lake, as they were wont to flow, the waters of said Malheur lake at mean high-water would extend beyond the meander line of said lake as surveyed in 1895, and referred to in plaintiff's Bill of Complaint. Defendant admits that the annual evaporation of Harney and Malheur lakes is approximately forty inches.

Defendant denies that from time immemorial there has been no vegetation within many miles of these lakes, except large areas of grease wood and sage brush, and a sparse growth of native grasses,

which is used for range grazing of stock during about seven or eight months of each year, but defendant alleges that for a long period of time before Oregon was admitted into the Union, and until the development of such irrigation projects, native grasses grew in abundance by the flooding of thousands of acres of land adjoining said Silvies river and the Donner und Blitzen river in the vicinity of and adjoining Malheur lake and by the flooding of large tracts of land adjoining the said lake at regularly recurring seasons of high water therein, and defendant admits that where the overflow of such rivers has been prevented by such irrigation projects, lands adjoining said lake and in the vicinity thereof not so overflowed and irrigated are covered with grease wood, sage brush and a sparse growth of native grasses used for range grazing of stock during about seven or eight months of each year. Defendant denies that the region is not productive, and denies that it does not produce commodities which would or could be transported by water; and defendant denies that said region is not susceptible of sustaining a population to be served by water transportation.

Defendant denies each and every other allegation contained in paragraph VII of plaintiff's Bill of Complaint.

VIII.

Defendant denies that Malheur, Harney and/or Mud lakes and each of them, throughout their entire areas are not now or never have been navigable in fact, and denies that said lakes and/or each of them are not now or never have been what are known as navigable waters, within the meaning of the laws of the United States, and denies that neither trade nor travel can move over said lakes in their natural or ordinary conditions, according to the customary modes of trade or travel over water, and denies that said lakes, and/or each of them, have not been used, and denies that they are not susceptible of being used in their natural or ordinary conditions as permanent highways or channels for useful commerce.

IX.

Defendant admits that said defendant, the State of Oregon, claims and asserts an estate, right, title and interest adverse to the United States in and to the lakes and the beds thereof described and referred to in plaintiff's Bill of Complaint. Defendant, the State of Oregon, admits that it publicly asserts that said Malheur, Harney and Mud lakes, and each of them, always have been, and now are, navigable, and that the title of the beds thereof vested in the State of

Oregon when and because it was admitted into the Union, February 14, 1859; and admits that it publicly asserts and claims that such title remains so vested in the State of Oregon. Defendant, the State of Oregon, alleges that said Malheur lake, Harney lake, the Narrows and Mud lake, at the time the State of Oregon was admitted into the Union, were in their natural states used and susceptible and capable of being used as a highway for commerce, over which trade and travel were and could be conducted in the customary mode of trade and travel on water to and over said lakes and over said streams aforesaid leading into the same, and that all of said lakes were, at the time Oregon was admitted into the Union and ever since have been, navigable waters, and the title to the beds thereof, including all of the lands below the meander line or ordinary high-water marks on said lakes vested in the State of Oregon on its admission into the Union. Defendant, the State of Oregon, denies that its claim or assertion of interest is a cloud upon any alleged title of the plaintiff herein to the beds of the lakes involved in this suit. Defendant denies that the plaintiff has any title to any of the lake bed lands involved in this suit.

X.

Defendant, the State of Oregon, denies that said state has no proprietary title or interest in or to the lake bed lands as aforesaid, or any part thereof.

XI.

The defendant, the State of Oregon, admits that the plaintiff has no plain, speedy or adequate remedy at law, and alleges that the plaintiff has no title, legal or equitable, in the lakes or beds thereof, the subject-matter of this suit, and denies that any title to any of said lake bed lands, described and referred to in plaintiff's Bill of Complaint, should be quieted by this court in the plaintiff, and denies that this defendant, the State of Oregon, should be prevented from asserting its right, title and interest therein and thereto, and denies that it should be prevented from interfering with the purported possession, use, or purported enjoyment thereof by the plaintiff, and denies that the plaintiff is entitled to the possession, use or enjoyment of any of said lake bed lands, and denies that great or irreparable damage or injury will result to the plaintiff, and denies that the plaintiff has any right or power to proceed with any development or administration of said purported Lake Malheur reservation. Defendant denies that the plaintiff is entitled to any relief herein whatsoever.

Defendant, the State of Oregon, denies each and every allegation in the bill not herein admitted, controverted or specifically denied.

For a second, further and separate and distinct defense to said Bill of Complaint, defendant, the State of Oregon, alleges:

I.

That prior to the admission of defendant, the State of Oregon, into the Union, no portion of what is now known as Malheur lake, Mud lake, the Narrows or Harney lake, or any of the waters thereof, or any of the bed or shore of said lakes or any of them, or any portion of what is designated in the Bill of Complaint as Lake Malheur reservation, was by any treaty, statute, patent, or otherwise, reserved or disposed of, or granted away, and no attempt was made by the plaintiff or the Congress thereof, or otherwise or at all, to dispose of any of the area or areas involved in this suit during any time that the same constituted a portion of the Territory of Oregon.

II.

That prior to the time the defendant, the State of Oregon, was admitted into the Union, which was on February 14, 1859, that portion of the area involved in this suit, namely, what is herein referred to and designated as Mud lake in plain-

tiff's Bill of Complaint, and which had been a portion of Harney lake, had become separated from Harney lake by the action of expanding ice and the action of the winds and waves of the lakes by a sand reef varying from about five to ten chains in width and about twenty feet in height, and which is the identical sand reef referred to in the plaintiff's Bill of Complaint, and which sand reef ran in a northwesterly direction, all in township 27 south, range 30 east of the Willamette meridian according to the United States surveys; that said sand reef was the westerly boundary of what is designated in the Bill of Complaint as Mud lake. That said Mud lake was separated from the rest of Malheur lake by a narrow channel of water known as the Narrows and located in sections 26 and 27 in township 26 south, range 30 east of the Willamette meridian, Oregon, "south of Malheur lake" according to the plat of the government survey thereof; that said Narrows is the identical area designated as the "Narrows" in plaintiff's Bill of Complaint.

III.

That said sand reef prior to, at the time of and long after Oregon was admitted into the Union separated the waters of Harney lake from that portion thereof designated in plaintiff's Bill of Complaint as Mud lake, and which Mud lake, the

Narrows and said Malheur lake were designated on the plats of the government surveys as Malheur lake, and have ever since been so commonly called, and at the time Oregon was admitted into the Union and for a long time thereafter the waters of said Malheur lake, including Mud lake, at ordinary recurring seasons of high water in said lakes, stood substantially at a level near the top of said sand reef; defendant alleges that at the time Oregon was admitted into the Union that the waters of said Malheur lake covered an area in excess of 47,000 acres; that the waters of said Malheur lake, including Mud lake, and the waters of Harney lake, constituted permanent bodies of water, and the lands underneath the said waters, to wit, the beds thereof, were distinctly lower and materially different from adjoining lands and were in a well-defined basin, and for many miles around various portions of said lake the banks thereof were very abrupt and distinct; that in other portions thereof the beds were more sloping and gentle, and vegetation such as usually and normally grows in the shallower portions of lakes sprang up and flourished therein.

IV.

That at the time the defendant, the State of Oregon, was admitted into the Union, and for a long time thereafter, to wit, until said sand reef

was cut and broken through as stated in plaintiff's Bill of Complaint as hereinafter referred to Malheur lake was substantially an open body of water, gradually growing deeper from the margin thereof to a depth of more than 17 feet in the deepest portion thereof, and substantially the greater portion of said lake varied in depth from four to 17 feet; that the greater portion of the remainder of said lake varied in depth from one foot at the margin thereof to four feet; that the said Silvies river varies in width from 50 to 100 feet, and during the spring and summer seasons, with the ordinary recurring seasons of high water, was and ever since has been and now is capable of discharging and does discharge into said Malheur lake in excess of 2,000 second-feet of water; that said Donner und Blitzen river likewise did, ever since has and does now discharge into Malheur lake, during ordinary recurring seasons of high water, in excess of 2,780 second-feet of water; that said Silver creek at all times herein mentioned has a maximum discharge in excess of 340 second-feet of water. That said Silvies river and said Donner und Blitzen river at the time Oregon was admitted into the Union were and still are in their natural state used, and susceptible and capable of being used, as a highway for commerce, over which trade and travel are and may be con-

ducted in the customary mode of trade and travel on water to and from said Malheur lake and said Mud lake; that said waters ever since Oregon was admitted into the Union have been and now are used for carrying products by row boats, flat boats and gasoline launches, and to transport therein ordinary products of commerce and of the region in which such rivers are situated as well as affording means of travel by water from various portions of Harney valley to another. That Malheur lake, including said Mud lake, and said Harney lake at the time Oregon was admitted into the Union, and all of said lakes ever since, providing the waters of said Silvies river, Donner und Blitzen river and said Silver creek are allowed to flow down the said streams into their respective outlets into said lakes, as they always have been and now are capable of flowing, instead of being diverted in great part, as is now being done, for the irrigation of vast tracts of lands of private individuals and of irrigation districts situated in said Harney valley, now are in their natural state throughout the greater portion of each year used and capable and susceptible of being used as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and from the time of the admission of Oregon into the Union and ever

since vast quantities of game fish and game birds have made their habitat therein and thereon; and until said executive proclamation of August 18, 1908, attempting to create such Lake Malheur reservation, large numbers of persons used such lakes and the waters thereof and traversed the same with row boats and gasoline launches for the purpose of fishing and hunting and travel thereover, and said lakes and the waters thereof at the time Oregon was admitted into the Union, prior thereto, and ever since have been used and are capable and susceptible of being used for sailing, rowing, fishing, fowling, trapping, bathing, skating, the taking of water for domestic and agricultural purposes, and the cutting of ice and the transportation of fish and game, the products of the fields and forests, and defendant alleges that at all of said times said Malheur lake, including Mud lake and Harney lake, have been and now are navigable and public waters, and common to the people of the community, and defendant alleges that the plaintiff ever since said executive proclamation aforesaid has caused its agents and wardens of the Secretary of Agriculture in the purported conservation of migratory and native birds on such lakes, to travel over the waters of said Malheur and Mud lakes and portions of Harney lake in row boats, and to patrol the same with

gasoline launches, and has caused and does now cause its said agents and wardens to conduct and carry great numbers of the public over the waters of said lakes and portions of the rivers flowing therein in gasoline launches for pleasure and for the purpose of sightseeing, viewing migratory and native birds, and the study of the nesting habits of innumerable numbers of wild water fowl and game birds, migratory and native, which make the said lakes and the waters thereof their resting and breeding places, as well as large quantities of fur-bearing animals.

V.

Defendant alleges that after the State of Oregon was admitted to the Union, and prior to the cutting and breaking through of the sand reef aforesaid separating the waters of Harney lake from Mud lake, and about the year 1877, the plaintiff, through the Department of the Interior and the General Land Office caused the lands adjoining said Malheur lake, including Mud lake and the Narrows and said Harney lake to be surveyed according to the provisions of the statutes for the survey of public lands, and did further cause the said lakes to be meandered, and field notes and plats of said surveys to be made and filed, and which were approved and accepted by the plaintiff; that shortly after such surveys were com-

pleted, and the field notes and plats of the surveys made, filed and approved and accepted, some person or persons to this answering defendant unknown during high waters in said Malheur lake and Mud lake caused a cut or rift to be cut and broken through the top of said sand reef and a strait to be formed approximately 50 to 75 yards wide through said sand reef, by reason of which a current of great capacity was formed and vast quantities of water were caused to flow from said Malheur and Mud lakes into said Harney lake; that by reason thereof great quantities of water from Malheur and Mud lakes flowed into Harney lake, and large portions of the beds of said lakes and lowlands below the meander line became permanently uncovered, and by reason thereof and due to the fact that the plaintiff claimed that there were mistakes and errors made in the running of the meander lines around said Malheur and Mud lakes, and while large portions of the surveyed lands abutting on such meander lines were undisposed of by the plaintiff and remained a part of the public lands of the plaintiff, said plaintiff, by orders of the Commissioner of the General Land Office in the year 1895, and acting under the direction of the Department of the Interior (*The Pacific Live Stock Co. v. Armack*, 30 Land Decisions, 521), caused a new survey to be made and the lines of the public surveys as theretofore estab-

lished to be extended from the then meander line of said lakes to the present shore line, and said plaintiff did enter into a contract with one John H. Neal, a competent and disinterested surveyor, on or about the first day of June, 1895, to survey such lands so laid bare and unsurveyed between the prior meander line and the then present shore line of said Malheur and Mud lakes, which contract was numbered 634, and the plaintiff directed the said surveyor to establish a new meander line at mean high-water mark or line. Defendant alleges that said surveyor did in the fall and winter of 1895 and 1896 survey said lands and establish such new meander line of said lakes in accordance with and as directed in his contract and the instructions of the plaintiff, and did prepare and file his field notes of said surveys and of the said new meander line, and the plaintiff did cause plats of such surveys, including the said new meander lines, and the location of said lakes to be made and filed in the office of the United States Surveyor General for Oregon and in the General Land Office of the United States, and such surveys, meander lines and plats were accepted by the plaintiff, and by the said United States Surveyor General and the Commissioner of the General Land Office of the plaintiff, and ever since have remained on file and of record in the said respective offices of the plaintiff, and their successors

in office and with the register and receiver of the local land office of the United States in the district in Oregon in which said Malheur lake, Mud lake and the Narrows were situated; that said meander lines were accurate and complete, run and made in good faith, and without fraud or gross or any mistake, and have ever since remained unimpeached as the correct survey of said lands bordering said Malheur and Mud lakes and the correct establishment of the meander lines thereof; that ever since the acceptance and approval of said surveys, field notes and plats thereof, the plaintiff has caused patents and other grants to be issued for substantially all of the lands included in said survey of 1877, and of said John H. Neal survey of 1895-6, and has granted and conveyed to the state of Oregon and to private individuals substantially all of the lands bordering on said Malheur and Mud lakes and Harney lake, and adjoining the meander lines established on said Malheur and Mud lakes by said survey of John H. Neal, or made fractional by the said meander lines, as well as all other lands included in its said public surveys; that all of said grants and patents have been, according to the official plat of the survey of said land, returned to the General Land Office by the Surveyor General, and were made and delivered to the respective grantees and patentees and accepted by them without any reservation of title

or interest in the United States to any of the waters of said lakes or the bed or shores thereof underneath said waters, or any reservation of title to land or water within said meander lines of said lakes, and defendant, the State of Oregon, alleges that thereupon and thereby the plaintiff, the United States of America, abandoned all claim to the waters of said Malheur, Mud and Harney lakes and the Narrows and the soils under the same and abandoned all claim to the beds of said lakes, including the space between ordinary high and low water marks and the whole of said lake beds below the meander lines of said lakes, and assented that the said conveyances, grants and patents of the United States of America should be construed and given effect according to the laws of the State of Oregon and be determined by the laws of said State, and defendant alleges that it is the owner of all of said lands and waters within the meander lines of said lakes, and that plaintiff, the United States of America, its various departments, officers and agents, should be and are estopped, by reason of the facts hereinabove alleged, from making any claim of right, title, interest or estate in or to the waters of said Malheur lake, the Narrows, Mud lake and Harney lake or of the beds thereof or any portion of the soils below the meander lines on said lakes or the ordinary high-water mark or line of said lakes.

That at the present time and for a number of years last past, and since the first day of June, 1923, water has been and is now being diverted from said Silvies river for the irrigation of in excess of 87,500 acres of land, and the duty of water in said valley and the normal amount required during the irrigation season is two acre-feet.

That at the present time and for a number of years last past, and since the first day of June, 1923, water has been and is now being diverted from said Donner und Blitzen river for the irrigation of in excess of 65,500 acres of land, and the duty of water in said valley and the normal amount required during the irrigation season is two acre-feet.

That at the present time and for a number of years last past water has been and is now being diverted from said Silver creek for the irrigation of in excess of 24,000 acres of land, and the duty of water in said valley and the normal amount required during the irrigation season is two acre-feet.

That ever since the establishment of said Neal meander line in 1895, and until the withdrawal of the waters of said Silvies river and Donner und Blitzen river for irrigation, as aforesaid, the waters of said lake at the regular recurring sea-

sons of ordinary high water came up to and beyond said meander line, and at this time if the waters of said Silvies river and the Donner und Blitzen river were allowed to flow into the lakes as they were wont to flow, without being diverted for irrigation purposes as aforesaid, the waters of said lake would be at said John H. Neal meander line, and said meander line is still the actual line of mean or ordinary high water of said lake.

VI.

That the State of Oregon has at no time, either by legislation or judicial decision, recognized any title or ownership in the plaintiff or any one else in the beds of navigable or meandered lakes; that by an act approved by the Governor and filed in the office of secretary of state February 19, 1917, being chapter 278, General Laws of Oregon, 1917, it was provided as follows:

AN ACT

Declaring the title to the beds of navigable lakes, not already acquired by any person, firm, or corporation, to be in the state of Oregon; providing that the state may use and dispose of the same, and preventing persons in the future from acquiring title thereto, except in the manner provided by law.

Be It Enacted by the People of the State of Oregon:

Section 1. The title to the beds of all navigable lakes in this state now existing or which may have

been in existence in 1859, when the state was admitted to the Union, or at any time since said date, and which has not become vested in any person, firm or corporation, is vested in and claimed by the State of Oregon, and the State of Oregon is hereby declared to be the owner of the beds of such lakes, and may use and dispose of the same in such manner as now is, or may hereafter be, provided by law.

Section 2. After this act takes effect, no person, firm or corporation shall acquire any right, title or interest in or to the beds of any such navigable lakes, or any part thereof, by reliction or otherwise, or by reason of the lowering or drainage of the waters of such lakes, except in the manner which now is, or may hereafter be, provided by law.

Said statute has never been modified, altered or repealed, and is still in full force and effect.

VII.

That by an act approved by the Governor of Oregon and filed in the office of the secretary of state February 25, 1921, the legislative assembly of the state of Oregon enacted a statute, the same being chapter 280, General Laws of Oregon, 1921, wherein it was provided as follows:

AN ACT

Asserting the title of the state of Oregon to lands constituting the beds of all lakes wholly or partially within the state of Oregon which have been meandered by the United States surveys, and the public character of such lakes, excepting non-navigable lakes within certain drainage districts (and) providing for the interpretation of this act.

Be It Enacted by the People of the State of Oregon:

Section 1. *Navigable or Public Waters.* Any and all lakes wholly or partially within the state of Oregon which have been meandered by the United States surveys, are hereby declared to be navigable and public waters, and the waters thereof are hereby declared to be of public character, and the title to the bed and land thereunder, including the shore or space between ordinary high and low water marks and between ordinary high and low water lines, which are not included in the valid terms of a grant or conveyance from the state of Oregon, is hereby declared to be in the state of Oregon, and the state of Oregon hereby asserts and declares its sovereignty over the same and its ownership thereof; provided, however, that the provisions of this act shall not apply to any nonnavigable lakes lying within the boundaries of any duly organized and incorporated drainage district which was in existence on January 1, 1921.

Section 2. Nothing in section 1 of this act shall be construed as impairing the title of any upland or riparian owner or owners to or any vested rights in land which has heretofore been added by natural accretion or reliction to the lands of such upland owner or owners.

Section 3. It is hereby declared that there is and shall hereafter be no vested rights in or to any future accretion or reliction to the lands of any upland or riparian owner or owners on any such lake or public waters and after this act takes effect no person, firm or corporation shall acquire any right, title or interest in or to the beds of any such public waters or any part thereof, by reliction, accretion or otherwise, or by reason of the lowering or drainage of the waters of such lakes, except in the manner which now is, or may hereafter be provided by law; pro-

vided further, however, that upon the drainage of such lakes aforesaid, the title of owners of land riparian to such lakes which have heretofore or may be hereafter drained under any of the provisions of the laws of the state of Oregon is hereby declared to extend to so much of the bottom or bed of such lake or lakes which have or which may be hereafter reclaimed by such drainage as is required to fill out the least fractional subdivision or subdivisions of any section owned by such riparian owners and which is rendered fractional by the meander line of such lake or lakes; and the title of said owners shall be so limited when the waters of said lake or lakes receding, because of such drainage, have uncovered or shall hereafter uncover the bed thereof; provided further, however, that, where by reason of natural accretion or reliction such fractional subdivision or subdivisions of such upland owners shall have been heretofore filled out thereby, such upland owners shall hold to the line of such lands as the same have been extended by such natural accretion or reliction. Lands which are covered at ordinary high water at ordinarily recurring seasons by the waters of any such lakes or public waters as defined in section 1 of this act, or from which the waters of any such lakes or public waters have not at ordinarily high water permanently receded, shall not be deemed or held to be accreted or relicted lands, but the same and all accretions and relictions hereafter occurring or formed over any of the lands of the state of Oregon, as hereinbefore provided, shall be and remain the property of the state of Oregon, and may be by it leased, demised, sold or disposed of in the manner now or hereafter provided by law.

Section 4. The state land board of the state of Oregon in the name of said state and for its use and benefit shall have the power to acquire and secure

by purchase, gift, condemnation or otherwise, any and all riparian rights which may, by any court of competent or final jurisdiction, be held to be owned by or vested in any upland or riparian owner on any of said lakes or public waters, and shall have the power to institute such suits or actions as may be necessary in such condemnation proceedings and shall proceed in the manner and have the powers provided by law for the condemnation of property for the use or benefit of the state of Oregon.

Section 5. It is further provided that the several provisions and clauses of this act shall be deemed separate and severable, to the end that in the event any provisions, clause or clauses, or any portion of this act shall be held to be invalid or inoperative, (that) it shall not affect the remainder of this act, and the remaining portion or portions thereof shall be and remain in full force and effect and be deemed valid and operative.

Section 6. All persons who are qualified to become entrymen under the homestead laws of the United States of America and to secure patents to lands under such laws and who have heretofore and prior to January 1, 1921, in good faith settled upon lands within the meander lines of such lakes or other lakes returned as navigable by the United States surveys and who, on January 1, 1921, by reason of settlement, cultivation and improvements on any such lands would be entitled to patent from the United States of America if such lands were open or subject to homestead entry, shall be, and they are hereby, given a preference right to purchase from the state of Oregon such lands so settled upon by them, not exceeding 160 acres for any one person, upon such terms and at such prices and within such times as shall be fixed by the state land board of the state of Oregon; provided further, that owners of the upland

bordering upon such ordinary high water mark shall have a preference right to purchase, at the best price bid, state lands as herein defined and riparian to their said lands, and not exceeding 160 acres, in addition to the lands herein granted them by the provisions of this act.

That said chapter 280 has never been modified, altered or repealed, and is still in full force and effect.

VIII.

That by an act approved by the Governor of Oregon and filed in the office of secretary of state February 26, 1923, the legislative assembly of the State of Oregon enacted what is now known as chapter 282, General Laws of Oregon, 1923, wherein it was provided as follows:

AN ACT

To provide for the disposal of lake-bed lands to squatters and riparian owners, authorizing the state land board to make rules and regulations, enter into agreements with the federal government affecting certain lands, title to which is in dispute, and expend certain funds in carrying out such agreements.

Be It Enacted by the People of the State of Oregon:

Section 1. (a) Any person who has in good faith settled upon lands within the meander lines of any lake as defined in chapter 280, General Laws of Oregon, 1921, and who, on January 1, 1921, actually resided thereon and who has maintained his residence thereon for at least five years immediately prior to such date, and who has complied with the

requirements of settlement, residence, cultivation and improvement, specified for homestead entrymen under the homestead laws of the United States, and which would be sufficient to acquire title by patent if such lands were subject to homestead entry by qualified homestead entrymen, shall be entitled upon proof of such facts to the satisfaction of the state land board of the state of Oregon, to a deed from such state, conveying and granting such lands not exceeding 160 acres without cost; and in addition thereto, such person shall have a preferential right to purchase from the state of Oregon 160 acres of additional lands, chiefly valuable for agricultural purposes.

(b) Any person who has not resided on any such lake-bed lands for five years immediately prior to January 1, 1921, but who has purchased the improvement or possessory rights or claims of a prior occupant, and whose residence and possession when tacked to that of such prior occupant shall have extended for a period of not less than five years immediately prior to such date, shall have a preferential right to purchase such lands, not exceeding 160 acres, the price of which shall be fixed without reference to the value of the improvements thereon.

(c) The owners of lands riparian to Malheur and Mud lakes, in Harney county, Oregon, shall be granted title to so much of the bottom or bed of such lakes as is required to fill out the least fractional subdivision or subdivisions of any section owned by such upland owner or owners, and which is rendered fractional by the meander lines of such lakes, in addition to the rights recognized by chapter 280, Laws of Oregon of 1921, to any natural accretion or reliction which has heretofore been added to the lands of such upland owner or owners. Owners of any upland bordering upon such meander lines shall have a preferential

right to purchase, in addition, 160 acres of such state lands, chiefly valuable for agricultural purposes.

(d) All of such lands granted or which may be sold or conveyed by the state, shall be granted and conveyed in a reasonably compact area, to be determined by the state land board.

(e) All sales of such state lands shall be at prices fixed by the state land board, and no more than 320 acres shall be sold or conveyed to any one person.

(f) Settlers within the meander line of any lake or lakes specified by said chapter 280, General Laws of Oregon, 1921, shall have the first preferential right, and the state land board shall, so far as may be practicable, work out the various preferential rights by securing to each, all the lands which would be most advantageously used by such several persons. In case of conflict, the state land board shall give the parties a reasonable time in which to agree, and in the event that they can not agree, the state land board shall decide the matter and make conveyances as it shall deem just and equitable, and its decision in the matter shall be final.

(g) The state land board may adopt such reasonable rules and regulations as it shall deem necessary or expedient in the administration of this act, and shall fix the time within which such preferential rights shall be exercised.

(h) In the event that the federal government claims title or interest in any of such lake-bed lands, the same shall not be conveyed or otherwise disposed of, or preferential right therein accrue until such claim is settled, and the state land board is hereby authorized and empowered to enter into such agreements with the federal government affecting such lands as it deems best in the interest of the public, and in carrying out such agreements the board may utilize the proceeds from the sale of such lands, title

or interest in which is claimed by the federal government; provided, that nothing herein contained shall be deemed to empower or authorize the state land board of Oregon or any other agency of the state to enter into any agreement which will divest any person or corporation of any water rights acquired under the laws of the state of Oregon or otherwise.

Section 2. Any person who shall elect to take or accept any deed from the state of Oregon under the provisions of this act or chapter 280, General Laws of Oregon, 1921, to any lake-bed lands, shall be deemed to take the same in lieu of any claim to any other lands within the meander line of any such lake in which such deeded lands shall lie, and shall not thereafter be permitted to maintain in any court any claim to any lands inside the meander line of such lake other than to the lands conveyed to such person or persons by deed from the state of Oregon under the provisions of this act or said chapter 280, Laws of 1921, or which such person or persons shall acquire in good faith from a grantee or purchaser from the state of Oregon under said acts.

That said chapter 282 has never been modified, altered or repealed, and is still in full force and effect; except that since the commencement of this suit, by an act approved by the Governor of Oregon and filed in the office of the secretary of state March 6, 1931, and which became effective on June 6, 1931, the legislative assembly of the State of Oregon enacted what is now known as chapter 228, General Laws of Oregon, 1931, wherein said subdivision (h) aforesaid, of said chapter 282, General Laws of Oregon, 1923, was amended to read as follows:

(h) In the event that the federal government claims title or interest in any such lake-bed lands, the same shall not be conveyed or otherwise disposed of, or preferential right therein accrue until such claim is settled, and the state land board hereby is authorized and empowered to enter into such agreements with the federal government affecting such lands as it deems best in the interest of the public, and make such deeds and conveyances to the United States of America in consideration of the issuance of such patents by the United States of America to the state of Oregon of such lands or lakes beds within the meander lines of any such lakes as said state land board of the state of Oregon and the federal government may mutually agree upon; provided, however, that nothing herein contained shall be construed as a recognition of any title or interest in the United States of America below or within the meander lines of any meandered lake to any lands or waters of any such lake prior to the execution and delivery of a deed or conveyance from the state of Oregon herein, and as provided for herein; and in carrying out such agreements the board may utilize the proceeds from the sale of such lands, title or interest in which is claimed by the federal government; provided, that nothing herein contained shall be deemed to empower or authorize the state land board of Oregon or any other agency of the state to enter into any agreement which will divest any person or corporation of any water rights acquired under the laws of the state of Oregon or otherwise.

COUNTERCLAIM

The defendant, State of Oregon, for its counterclaim against the plaintiff, the United States of America, alleges as follows:

I

The defendant, State of Oregon, was admitted into the Union on February 14, 1859; that at that time, ever since, and now, there existed certain lakes known as Malheur lake, Mud lake and Harney lake, and a small channel separating Malheur lake from that portion thereof now known as Mud lake, which lakes constituted permanent bodies of water, and the lands underneath said waters, to-wit, the beds thereof, were distinctly lower and materially different from adjoining lands, and were in a well-defined basin, and for great portions around said lakes the same had very distinct banks, while in other portions thereof the beds were sloping and gentle, growing vegetation such as usually grows in shallower parts of lakes.

II

That before Oregon was admitted into the Union a sand reef, which is the identical sand reef referred to in plaintiff's Bill of Complaint, had been created by the action of expanding ice, winds and waves, varying in width from five to ten chains, and about twenty feet in height, and which

sand reef separated said Harney lake from that portion now known as Mud lake, and said sand reef was the westerly boundary of what is designated in the Bill of Complaint as Mud lake; that said lakes hereinabove mentioned, including the Narrows, are the identical Malheur lake, Mud lake, and the Narrows separating the two, and Harney lake referred to in plaintiff's Bill of Complaint.

III

That said Malheur lake constituted a body of water in excess of 47,000 acres; that Mud lake constituted a body of water substantially in excess of 2,000 acres, and Harney lake constituted a body of water substantially in excess of 23,000 acres; that the drainage basin of said lakes is approximately 5,340 square miles, and the normal annual precipitation is approximately ten inches; that the chief tributaries bringing a supply of water into said Malheur lake are the Silvies river on the north, and the Donner und Blitzen river on the south. The average total annual flow of the Silvies river always has been in excess of 130,000 acre-feet, and of said Donner and Blitzen river in excess of 150,000 acre-feet. That the chief source of supply of Harney lake, at the time Oregon was admitted into the Union, was Silver creek, the total annual flow of which is in excess of 75,000 acre-feet.

IV

That in recent years the waters of said Silvies river have been diverted for irrigating uplands in excess of 87,500 acres, likewise the waters of the Donner und Blitzen river have been diverted for the irrigation of in excess of 65,500 acres of land, and likewise the waters of Silver creek have been diverted for the irrigation of in excess of 24,000 acres of land. The duty of water in said valley and the normal amount required during the irrigation season is two acre-feet; that said quantity of water is now being diverted from said streams, and is not at present flowing into such lakes, and the same, by reason of such artificial irrigation of lands in the valleys of said two rivers and of said Silver creek, are very shallow at this time; that if said waters were allowed to flow in their natural state the said lakes would stand approximately at the level they were at the time Oregon was admitted into the Union.

V

That said Harney lake, after the cutting through of the sand reef hereinafter referred to, has become a sump for the evaporation of waters flowing therein from Malheur and Mud lakes, and such waters are strongly salt and alkali, and all of the lands inside of the meander line of Harney lake are substantially worthless.

That said Malheur, Harney and Mud lakes, at the time Oregon was admitted into the Union, and for many years thereafter, up to and at the time said sand reef was broken through, were bodies of water varying in depth from a few inches at the margins to seventeen feet over the greater portion of the bed thereof, and each of said lakes during the ordinary recurring seasons of high water were of such maximum depth.

VI

That the said Malheur and Mud lakes, and the Narrows and said Harney lake at the time Oregon was admitted into the Union, and at the time of the survey of the upland bordering said lakes, as hereinafter referred to, were in their natural states used and susceptible and capable of being used as a highway for commerce, over which trade and travel were and could be conducted in the customary mode of trade and travel on water, to and from and over said lakes and over said streams aforesaid, and the waters of said lakes were used and capable of being used for carrying products by row boats, flat boats and gasoline launches, and great numbers of people used such lakes for sailing, rowing, fishing, fowling, trapping, bathing, skating, the cutting of ice, and other public uses and the transportation of fish, game and fur-bearing animals over and across the same, and the

same were at all times susceptible of being used for said purposes of trade and travel, and defendant alleges that all of said lakes were, at the time Oregon was admitted into the Union and ever since have been, navigable waters.

VII

That prior to the admission of defendant, the State of Oregon, into the Union, no portion of what is now known as Malheur lake, Mud lake, the Narrows or Harney lake, or any of the waters thereof, or any of the bed or shore of said lakes or any of them, or any portion of what is designated in the Bill of Complaint as Lake Malheur reservation, was by any treaty, statute, patent, or otherwise, reserved or disposed of, or granted away, and no attempt was made by the plaintiff or the Congress thereof, or otherwise or at all, to dispose of any of the area or areas involved in this suit during any time that the same constituted a portion of the territory of Oregon.

VIII

Defendant alleges that after the State of Oregon was admitted to the Union, and prior to the cutting and breaking through of the sand reef aforesaid separating the waters of Harney lake from Mud lake, and about the year 1877, the plaintiff, through the Department of the Interior

and the General Land Office caused the lands adjoining said Malheur lake, including Mud lake and the Narrows and said Harney lake to be surveyed according to the provisions of the statutes for the survey of public lands, and did further cause the said lakes to be meandered, and field notes and plats of said surveys to be made and filed, and which were approved and accepted by the plaintiff; that shortly after such surveys were completed, and the field notes and plats of the surveys made, filed and approved and accepted, some person or persons to this answering defendant unknown during high waters in said Malheur lake and Mud lake caused a cut or rift to be cut and broken through the top of said sand reef and a strait to be formed approximately 50 to 75 yards wide through said sand reef, by reason of which a current of great capacity was formed and vast quantities of water were caused to flow from said Malheur and Mud lakes into said Harney lake; that by reason thereof great quantities of water from Malheur and Mud lakes flowed into Harney lake, and great portions of the beds of said lakes and low lands below the said meander line became permanently uncovered, and by reason thereof and due to the fact that the plaintiff claimed that there were mistakes and errors made in the running of the meander lines around said Malheur

and Mud lakes, and while large portions of the surveyed lands abutting on such meander lines were undisposed of by the plaintiff and remained a part of the public lands of the plaintiff, said plaintiff, by orders of the Commissioner of the General Land Office in the year 1895, and acting through the directions of the Department of the Interior (*The Pacific Live Stock Co. v. Armack*, 30 Land Decisions, 521), caused a new survey to be made and the lines of the public surveys as theretofore established to be extended from the then meander line of said lakes to the present shore line, and said plaintiff did enter into a contract with one John H. Neal, a competent and disinterested surveyor, on or about the first day of June, 1895, to survey such lands so laid bare and unsurveyed between the prior meander line and the then present shore line of said Malheur and Mud lakes, which contract was numbered 634, and the plaintiff directed the said surveyor to estalish a new meander line at mean high water mark or line. Defendant alleges that said surveyor did in the fall and winter of 1895 and 1896 survey said lands and establish such new meander line of said lakes in accordance with and as directed in his contract and the instructions of the plaintiff, and did prepare and file his field notes of said surveys and of the said new meander line, and the plaintiff did cause plats

of such surveys, including the said new meander lines, and the location of said lakes to be made and filed in the office of the United States Surveyor General for Oregon and in the General Land Office of the United States, and in the local land office of the United States in the state of Oregon in the district in which lakes were situated, and such surveys, meander lines and plats were accepted by the plaintiff, and by the said United States Surveyor General and the Commissioner of the General Land Office of the plaintiff, and ever since have remained on file and of record in the said respective offices of the plaintiff, and their successors in office; that said meander lines were accurate and complete, run and made in good faith, and without fraud or gross or any mistake, and have ever since remained unimpeached as the correct survey of said lands bordering said Malheur and Mud lakes and the correct establishment of the meander lines thereof; that ever since the acceptance and approval of said surveys, field notes and plats thereof, the plaintiff has caused patents and other grants to be issued for substantially all of the lands included in said survey of 1877, and of said John H. Neal survey of 1895–6, and has granted and conveyed to the state of Oregon and to private individuals substantially all of the lands bordering on said Malheur and Mud lakes and Harney lake, and adjoin-

ing the meander lines established on said Malheur and Mud lakes by said survey of John H. Neal, or made fractional by the said meander lines, as well as all other lands included in its said public surveys; that all of said grants and patents have been according to the official plat of the survey of said land returned to the General Land Office by the Surveyor General, and were made and delivered to the respective grantees and patentees without any reservation or claim of reservation of title or interest in the United States to any of the waters of said lakes or the bed or shores thereof underneath said waters, or any reservation of title to land or water within said meander lines of said lakes, and defendant alleges that upon the making, acceptance and filing of said plats and surveys of Harney lake and of the J. H. Neal survey of 1895–6 of Malheur lake, Mud lake and the Narrows, and the patenting and disposing of substantially all of the uplands and surveyed lands as shown by the official plats of the survey of said lands, returned to the General Land Office by the Surveyor General to the state of Oregon and to private individuals without any reservations or claims of reservation of title or interest in the United States to any of the waters of said lakes or the bed or beds or shores thereof beneath said waters, or below the water lines of said lakes or any reservation of title to land or water within said meander lines of said lakes and by the issuing

of grants and patents containing no words showing any purpose to define riparian rights, that thereby and thereupon the plaintiff, the United States of America, abandoned all claim to the waters of said Malheur, Mud and Harney lakes and the Narrows and the soils under the same and abandoned all claim to the beds of said lakes, including the space between ordinary high and low water marks and the whole of said lake beds below and within the meander lines of said lakes and assented and intended to and did assert to the defendant, to its said grantees and patentees, their successors and assigns and who did accept the same relying thereon, and to the world, that the said conveyances, grants and patents of the United States of America should be construed and given effect according to the laws of the State of Oregon and be determined by the laws of said state and the plaintiff thereupon became and is estopped from making any claim of right, title, interest or estate in or to any of the waters of Malheur lake, Harney lake, Mud lake and the Narrows or to the beds thereof or any portion of the soils below the meander lines of said lakes or any of them or any lands or waters below ordinary high-water mark or line on said lakes, and defendant alleges that it is the owner of all of said lands and waters within the meander lines of said lakes.

The State of Oregon has at no time, either by legislation or judicial decision, recognized any title

or ownership in the plaintiff or any one else in the beds of navigable or meandered lakes in the State of Oregon.

IX

That by an act approved by the Governor, and filed in the office of the secretary of state February 19, 1917, the legislative assembly of the State of Oregon enacted a statute, the same being chapter 278, General Laws of Oregon, 1917, a substantially true and correct copy of which is set forth in paragraph VI of defendant's second further, separate and distinct defense to the bill of complaint of the plaintiff herein, and which is hereby referred to and incorporated into this pleading as if at this place in words and figures fully set forth; that said statute has never been modified, altered or repealed, and is still in full force and effect.

X

That by an act approved by the Governor of Oregon, and filed in the office of the secretary of state February 25, 1921, the legislative assembly of the State of Oregon enacted a statute, the same being chapter 280, General Laws of Oregon, 1921, a substantially true and correct copy of which is set forth in paragraph VII of defendant's second further, separate and distinct defense to the Bill of Complaint herein, and which

is hereby referred to and incorporated into this pleading as if at this place in words and figures fully set forth; that said chapter 281, General Laws of Oregon, 1921, has never been modified, altered or repealed, and is still in full force and effect.

XI

That by an act approved by the Governor of Oregon, and filed in the office of the secretary of state February 26, 1923, the legislative assembly of the State of Oregon enacted what is now known as chapter 282, General Laws of Oregon, 1923, a substantially true and correct copy of which is set forth in paragraph VIII of defendant's second further, separate and distinct defense to the Bill of Complaint herein, and which is hereby referred to and incorporated into this pleading as if at this place in words and figures fully set forth; that said statute has never been modified, altered or repealed, and is still in full force and effect; except that subdivision (h) thereof has been amended by chapter 228, General Laws of Oregon, 1931, by an act filed in the office of the secretary of state March 6, 1931, a substantially true and correct copy of which is set forth in said paragraph VIII of defendant's separate, further and distinct defense to the bill of complaint herein and is hereby referred to and incorporated into this pleading as if in words and figures at this place fully set forth.

XII

A map, marked "Exhibit A", and showing the general location of said lakes involved in this suit, is attached to plaintiff's Bill of Complaint, and is the ide tical area involved in this counterclaim.

That the plaintiff, United States of America, claims to be the owner of said lands and the beds thereof, adverse to the State of Oregon, but defendant alleges that plaintiff has no right, title or interest therein.

Defendant further alleges that on or about August 18, 1908, the President of the United States issued and made a proclamation, a copy of which proclamation with diagram attached thereto is marked "Exhibit B", and annexed to plaintiff's Bill of Complaint, and defendant alleges that said proclamation and pretended executive order was of no force or effect, was ultra vires, and constitutes an unlawful attempt to exercise jurisdiction and control over lands and waters within and belonging to the defendant, State of Oregon.

XIII

Defendant alleges that ever since the making of said proclamation, the Department of Agriculture of the plaintiff has attempted to administer said pretended Lake Malheur reservation as a permanent reserve or breeding ground for native birds and wild water fowl, and ever since said

executive proclamation plaintiff has caused its agents and wardens of the Department of Agriculture, in the purported conservation of migratory and native birds on said lakes, to travel over the waters of said Malheur and Mud lakes, and said Narrows and portions of Harney lake in row boats, and to patrol the same with gasoline boats, and has ever since caused and now causes its said agents and wardens to conduct and carry great numbers of the public over the waters of said lakes and portions of the rivers flowing therein in gasoline launches for pleasure, and for the purpose of sightseeing, viewing migratory and native birds, and the study of the nesting habits of innumerable numbers of wild water fowl and game birds, migratory and native, which make the said lakes and waters thereof their nesting and breeding places, as well as large quantities of fur-bearing animals, and have prevented all citizens of the State of Oregon from traversing said lakes for trade, travel or pleasure, or from hunting or fishing thereon, and has excluded all members of the public and has claimed sole and exclusive jurisdiction over the same, and has claimed immunity for itself, its agents and wardens, by reason of its pretended and alleged sovereignty.

XIV

Defendant alleges that said Harney lake, together with the bed thereof up to ordinary or mean high-water mark and below the meander lines as shown in the United States survey thereof and said Malheur and Mud lakes and the Narrows connecting the same together with the bed thereof up to ordinary or mean high-water mark and below the meander line thereof as shown and according to the official plats of the survey of said land returned to the General Land Office by the Surveyor General, became the property of the State of Oregon upon its admission to the Union and still remains and is now the property of the State of Oregon.

XV

That the defendant, the State of Oregon, has no plain, speedy or adequate remedy at law, and unless its title is quieted by this court to the said Harney lake, Malheur lake, Mud lake and the Narrows separating Malheur and Mud lakes hereinbefore described and according to the official plats of the survey of said lands and lakes and the beds thereof, and unless the plaintiff, the United States of America, is prevented from asserting any adverse title, right or interest therein and from interfering with the possession, use or enjoyment

thereof, great and irreparable damage and injury will result to the defendant and the State of Oregon can not proceed with the development and sale of those portions of the lake bed thereof suitable for reclamation from the waters of said lake as provided in said chapter 280, General Laws of Oregon, 1921, aforesaid and said chapter 282, General Laws of Oregon, 1923, aforesaid.

Wherefore, the defendant, the State of Oregon, prays:

(a) That the relief prayed for by the plaintiff, the United States of America, and the whole thereof be denied and that the said plaintiff be denied any relief whatsoever.

(b) That any and every claim of estate, right, title, or interest in or to any of said lakes or the beds thereof or any portion below the meander lines of said lakes or below ordinary or mean high-water mark or lines of said lakes, or any part thereof, or in or to the possession, use or enjoyment of the same, now or hereafter made or asserted by the plaintiff, the United States of America, be adjudged and decreed null and void and that the title thereto of the said defendant, the State of Oregon, be quieted as against any and all claims of the plaintiff, the United States of America.

(c) That the plaintiff, the United States of America, its officers, servants and agents, be enjoined forever from asserting any estate, right, title or interest in or to the said lakes and the beds thereof and the waters of the said lakes or any part thereof, adverse to the defendant, the State of Oregon, and from in any manner disturbing or interfering with the possession, use, and enjoyment thereof by the defendant, the State of Oregon.

(d) That the said attempted proclamation or executive order of August 18, 1908, by the President of the United States and referred to in paragraph numbered VI of plaintiff's Bill of Complaint be declared null and void, of no force or effect and that the same be canceled by this court as a cloud on the title of the defendant.

(e) That the defendant, the State of Oregon, have such other and further relief as it may be entitled to have in equity and good conscience.

I. H. VAN WINKLE,
Attorney General of Oregon,
L. A. LILJEQVIST,
Assistant Attorney General of Oregon.

July, 1931.

